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IN THE

Supreme Court of the United States

October Term, 1967

No. 387

ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION, MONTANA *Petitioners,*

v.

R. E. NORDWICK, Executor of the will and estate of ARTHUR L. NORDWICK, deceased, *et als, Respondents.*

RESPONDENTS' ANSWER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
Question presented	1
Petitioners' contention	3
1. Uniformity and Consistency of Administrative Practice	3
2. Administrative Practice Not Adversary	7
3. Authorities Cited By Solicitor	10
4. Widespread Effect	11
Conclusion	12

AUTHORITIES

Cases:

Fort Peck Indians v. United States, 132 F. Supp 222	9
Logan v. Davis, 233 U.S. 613, 627 (1914)	3,7
Skidmore v. Swift & Company, 323 U.S. 134	10
United States v. Leslie Salt Co., 350 U.S. 383, 396	6

Statutes:

Act of May 30, 1908, 35 Stat. 558	1
Act of June 15, 1926, 44 Stat. 746	4
Act of March 3, 1927, 44 Stat. 1401	2
Act of April 20, 1936, 49 Stat. 1235	4
Act of February 18, 1875, Ch. 80. Sec. 1, 18 Stat. 317, since amended and now existing as 43 USCA Sec. 2	7,8

Departmental Decisions:

Mineral Reservations in Trust Patents for Allotments To Fort Peck and Uncompahgre Ute Indians, 53 I.D. 538, 544	8,9

Text Books:

2 Am Jur 2d, Sec. 242, p. 69	9

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R. E. NORDWICK, Executor of the will and estate of Arthur L. Nordwick, deceased, et als, your Respondents, pray that the writ of certiorari requested by Petitioners herein, be denied.

Respondents take no issue with respect to matters set forth by Petitioners under headings OPINION BELOW, JURISDICTION, STATUTES INVOLVED, and STATEMENT and commence their answering brief with:

QUESTION PRESENTED

There is but one basic question involved in this case. Under the Act of May 30, 1908, 35 Stat 558 (Pet. Br. All-14) the surplus lands on the Fort Peck Indian Reservation were made

available for entry by homesteaders without oil and gas reserved. By the Act of March 3, 1927, 44 Stat 1401 (Pet. Br. A14-15) Congress amended the 1908 Act to provide that the oil and gas would be reserved to the Indians having tribal rights on said reservation ". . . in the tribal lands undisposed of on the date of the approval of this Act; . . .".

In 1925 Nordwick had filed his entry on the 160 acres involved. It was allowed and in good standing on the date of the Act of March 3, 1927. The question is whether the 1927 Amendment applies to this entry i.e., was the land "disposed of", because the Nordwick entry existed, or "undisposed of" because the entry, although existing in good standing, was not then completed as to all requirements and all payments, they not yet being due.[1] If "disposed of" Nordwick would be entitled to the oil and gas. If "undisposed of" the oil and gas would remain with the tribe.

The Circuit Court, speaking through Judge Browning, has set forth the various contentions on both sides, concluding that none of them make completely clear the result Congress intended by the language "undisposed of" as applied to these facts. (Pet. Br. A3-9) Submitted to the Circuit Court, however, was evidence, unrefuted by the Tribes, that the Government had, in at least 157 other similar cases, regarded a pending entry as making the land disposed of and patents in all these cases issued without reserving oil and gas.[2]

On this basis, Judge Browning stated: "This practice seemingly reflects a uniform contemporaneous interpretation of

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[1] Sec. 8, 1908 Act required full payment in 5 years and final proof in 7 years. (See Pet. Br. A12-13) Nordwick's entry was on January 24, 1925, or about 2 years old at the time of the 1927 Act.

[2] Pet. Br. A7-8. The 157 entries reported were the product of a partial survey of Land Office records, Billings, Montana, submitted in response to Memorandum For The United States which overlooked consulting, and failed to reflect, government Land Office records pertaining to the administrative practice on Nordwick-type entries. No incidents of patents being issued which reserved the oil and gas appear, except the original 1935 Nordwick patent involved in this case. As to it, the evidence shows the oil and gas was reserved by clerical error, contrary to instructions and was later corrected.

the 1927 Act by persons presumably familiar with its background and purposes, and we are persuaded by it."[3] The statement of the Supreme Court in the case of *Logan vs. Davis*, 233 U.S. 613, 627, is then quoted, supported by citation of other authorities.[4]

PETITIONERS' CONTENTIONS

The essence of petitioners' position, as we are able to understand it, is that the application of this rule is improper because the administrative practice relied upon was (1) not consistent or uniform,[5] (2) was not adversary,[6] (3) is contrary to the authorities cited in 1966 by the Solicitor of the Department of Interior,[7] and (4) will affect the oil and gas under perhaps 200,000 acres of land.[8] These contentions will be discussed in the order in which petitioners have presented them.

(1) UNIFORMITY AND CONSISTENCY OF ADMINISTRATIVE PRACTICE

Petitioners do not cite any evidence of general inconsistency or nonuniformity in the administrative practice, but contend only that there was no consistent practice in this very case.

By citing alleged inconsistencies in practice in this very case, petitioners are referring, not to the original Nordwick patent issued in 1935, but the supplemental patent issued in 1956 correcting the previous erroneous reservation of oil and gas. The acts relied upon as demonstrating inconsistency are

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[3] Pet. Br. A9-10. This conclusion is fortified by Petitioners' acknowledgement that as many as 200,000 acres may be involved (Pet. Br. p. 14). Since we are concerned only with lands filed upon prior to the 1927 Act, these 200,000 acres are ones already patented. The 157 patents listed in the partial survey of land office records cover 34,043.57 acres.

[4] Pet. Br. A10
[5] Pet. Br. pp. 10-11
[6] Pet. Br. pp. 11-12
[7] Pet. Br. pp. 13-14
[8] Pet. Br. p. 14

itemized in Petitioners brief (page 10). A list of them, with their dates indicated, is as follows:

Field Solicitor's Ruling, dated 2-14-56 (Pet. Ex. 56)

Assistant Solicitor Letter, dated 3-23-56 (Pet. Ex. 60)

Decision approving supplemental patent, dated May, 1956 (Pet Ex. 61)

Memorandum of United States, dated August, 1966.

To orient the significance of the dates of these actions, a brief review of the time period pertinent to the commencement and operation of the administrative practice in question is important.

Commencing with patents issued subsequent to March 3, 1927, the effect of the language in the 1927 Act had to be determined on every pre-1927 Act entry. Entries made subsequent to March 3, 1927 did not give rise to the problem because the oil and gas clearly remained in the tribe. Therefore the time span in which the administrative practice could operate was from March 3, 1927, forward to the date of filing of this suit in July, 1963, or a period of 36 years. During all of this time, so far as we have evidence on the point, post-1927 Act patents issued on pre-1927 Act entries without oil and gas reserved, except in the case of the Nordwick patent. Upon discovery of this fact Nordwick requested corrective action in November, 1955, and it was granted by the issuance of a supplemental patent on May 19, 1956 vesting him with the oil and gas which had previously been erroneously reserved. It is logical to assume that by this date all pre-1927 Act entries had been completed and patents therefor, when authorized, had been issued.[9]

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[9] The record in this case does not contain proof as to the date of the last patent on pre-1927 Act entries. The 1908 Act allowed full payment in 5 years and final proof in 7 years (Sec. 8, 1908 Act, Pet. Br. A13), but a series of extension acts were passed (Note 13, Pet. Br. A9, to which can be added as further examples the Act of June 15, 1926, 44 Stat. 746 and the Act of April 20, 1936, 49 Stat. 1235, plus such additional time as administrative appeals might consume). The latest known patent issued, as appears from the partial survey of Land Office records in evidence in this case, was on January 26, 1942 under Serial Great Falls 065689. Since 14 more years passed between that date and the issuance of Supplemental Patent to Nordwick on May 19, 1956, the assumption that final action on all pre-1927 Act entries had by then been taken seems justified.

In the course of events surrounding Nordwick's request for correction of his original patent, the Solicitor's Office first disagreed that he was entitled to the oil and gas (Pet. Ex. 60) but later endorsed the departmental decision ordering the issuance of supplemental patent. (Pet. Ex. 61) Thus, the practice followed for what was then the preceding 28 years was reaffirmed and the treatment accorded Nordwick was conformed to that given the hundreds of other similarly situated homesteaders. Such action, in spite of temporary disagreement by the Solicitor's Office, was concluded without discord in the department. However, 10 years later when the Circuit Court, in the process of this case, requested the views of the Solicitor-General, a new Solicitor adopted and republished the prior temporarily held view that the oil and gas belonged to the Tribes, and on that basis the Department of Justice concurred. It is obvious that neither the Solicitor nor the Department of Justice were aware that the author of the letter on which they relied had changed his views and endorsed the decision which authorized the supplemental patent. Also, it is obvious that neither was aware of the longstanding past practice on pre-1927 Act entries or that hundreds of other patents and thousands of acres of land would be affected if their views were followed.

Petitioners now ask the Court to review and reverse the lower Court because of an exchange of different opinions within the department which produced no change in administrative practice and occurred (in 1956) after 29 years of not reserving oil and gas in patents covering Nordwick-type entries. Even more extravagant is the contention that the 1966 expression by the Solicitor and The Department of Justice,[10] founded upon the prior but rescinded 1956 views of the Assistant Solicitor, should be accepted as demonstrative of inconsistency in administrative practice. Opinions expressed subsequent

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[10] See Memorandum For The United States, filed in this action at the request of the Circuit Court.

to the time the administrative action has run its full course cannot be considered interruptions or inconsistencies with respect to matters fully performed and completed years prior thereto.

> "Against the Treasurery's prior longstanding and consistent administrative interpertation it's more recent ad hoc contention as to how the statute should be construed cannot stand".
>
> *United States v Leslie Salt Co.* 350 U.S. 383, 396; 76 S. Ct. 416, 424; 100 L. Ed, 441 (1956)

In summary: Within a matter of months following passage of the 1927 Act, the practice was commenced of issuing patents without oil and gas reserved on pre-1927 entries.[11] This fact undeniably demonstrates a contemporaneous interpretation, made by those familiar with the background and purposes of the enactment, and it has been consistently reaffirmed without interruption by the later issuance of hundreds of other patents covering thousands of acres of land. The inconsistencies alleged by petitioner do not in fact exist because, first, they produced no change in administrative practice and, second, came in point of time after the administrative practice had on all other entries run its full course.

Further, petitioners allege that there has been a striking inconsistency in this very litigation. (Pet. Br.pp10-11) This refers to the fact that the original patent and the supplemental patent covered 240 acres. The District Court declared the Tribe to be the owners of the oil and gas under the 80 acres, but found Nordwick to be the owner as to the remaining 160 acres.

We fail to see how this is in any way pertinent to the question of administrative practice. The two tracts represent separate homestead entries, one on the 160 acres filed in 1925 and the other on 80 acres filed in 1929. Final proof was submitted on both at the same time and they were combined under one patent, but the factual and legal situations of each are different. The 80 acre tract was filed after the 1927 Act and

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[11] See Answer of Appellees to Memorandum For the United States.

the 160 acre tract was filed prior thereto. The alleged inconsistency of treatment by the lower Court just does not exist.

(2) ADMINISTRATIVE PRACTICE NOT ADVERSARY

Petitioners contend that even if the administrative practice were uniform it should not be controlling because it was not adversary in that the practice was carried out by the General Land Office (now The Bureau of Land Management) rather than the Bureau of Indian Affairs. (Pet. Br. p-11)

The applicable rule, as phrased in the case relied upon by the lower Court, is as follows:

> "This situation therefore calls for the application of the settled rule that the practical interpretation of an ambiguous or uncertain statute by the Executive Department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons." *Logan vs. Davis,* 233 US 613, 627.

No magic is claimed for the words "Executive Department". Whether a department, bureau, committee or agency it is the action taken by the instrumentality charged by Congress to act which gives the interpretive assistance.

As to the lands here concerned, the 1908 Act directed that they be disposed of under the general provisions of the homestead, desert-land, mineral and townsite laws of the United States. (Sec. 7, 1908 Act, Pet. Br. A 11) This placed the responsibility upon the Department of the Interior, within which the then existing law prescribed that it should act through the General Land Office.

> "The Commissioner of the General Land Office shall perform under the direction of the Secretary of the Interior all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority

of the Government." (R.S. Sec. 453; Feb. 18, 1875, Ch. 80, Sec, 1, 18 Stat. 317; since amended and now existing as 43 USCA Sec. 2.)

Therefore, the General Land Office was the administrative agency specifically designated by Congress to execute those provisions of the 1908 Act relating to the disposal of surplus lands. The effect given to General Land Office practices should not be destroyed by differences of opinion appearing years later as to whether a different agency could or should have been designated by Congress. Action taken in issuing hundreds of patents without oil and gas reserved was accomplished by the agency charged with the responsibility, and the controlling weight accorded by the lower Court was proper.

Petitioners apparently feel that in spite of specific Congressional direction, General Land Office actions should not be allowed to operate against Indian interests unless, in the process, such interests were represented by the Bureau of Indian Affairs, or had Secretarial approval. Because this contention is raised now for the first time in their petition the record contains no direct proof on the point. Therefore, the court is asked to indulge the assumption, totally unsupported by any evidence, that a complete lack of liason existed between the two agencies, and that the practices of the General Land Office during all of the years of handling pre-1927 Act entries were conducted without the participation, or even the knowledge, of the Bureau of Indian Affairs or the Secretary of the Interior or his office. This is an inconceivable assumption when it is realized that the 1908 Act covered not only homestead entries by non-Indians, but Indian allottments as well, necessarily tieing the activities of the two agencies together in such manner that one could hardly perform its function under the 1908 Act without the cooperation and participation of the other. Further, this assumption is directly refuted by a statement contained in instructions issued November 13, 1931, by First Assistant Secretary Dixon to the Commissioner of the General Land Office, 53 I.D. 538, 544, as follows:

"It is also noticed that the regulations of January 18, 1929 (Circulars and Regulations of the General Land Office, 1930, pp 715-716), providing for the reservation of oil and gas under the Act of March 3, 1927, in homestead entries made upon the Fort Peck lands directed that the reservation be made only upon future applications, and made no such requirement as to pending unperfected entries at the date of the act, which implies the construction that something less than a complete equitable title and vested right to a patent constituted a disposal of the land under the act."[12]

In light of this there is no question but what the practice of the General Land Office was known at the Secretarial level and by it approved through failing to direct otherwise.

In addition, the pattern of action and interaction between the Land Office and Bureau of Indian Affairs occurring under the 1908 Act is apparent from the contents of Findings and Conclusions, in evidence in this case, of the Indian Claims Commission, Docket No. 183 (Fort Peck Indians of the Fort Peck Reservation, Montana vs. United States, affirmed by the Court of Claims, 132 F. Supp. 222.). Applications by homesteaders for reappraisement of their lands necessitated constant contact between the two agencies.

Against this evidence and the presumption supporting the acts of Government officials, [13] there certainly is no justification for assuming that hundreds of patents, covering probably 200,000 acres of surplus Indian lands, over a period of many years

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[12] These instructions pertained specifically to an Indian allotment and demonstrate that the statutory construction problem of the 1927 Act existed as to such allotments. A schedule of Fort Peck allottments was completed February 28, 1927, but not approved until October 21, 1927 (p. 543). The contention had been raised as in this present case, that the words "undisposed of" import a final disposition of, and a vested right to the land, but the First Secretary found that the actual practice on Indian trust patents, as well as homestead patents, was to the contrary. Thus, the Bureau of Indian Affairs was applying the same interpretation of the 1927 Act to Indian allotments as the General Land Office was to pre-1927 homestead entries.

[13] 2 Am Jur 2d, Sec. 242, p. 69

were issued without the knowledge and participation of the Bureau of Indian Affairs or their mutual supervisor, the Secretary of the Interior.

Petitioners' application of the adversary principle in any event is misplaced. In the process of handling homestead entries the General Land Office was adversary to every entrymen to the extent of putting him on proof of his compliance with the requirements entitling him to a patent. Even if this adversary element did not exist, its lack would not be determinative against the lower Court's decision.

> "The fact that the Administrator's policies and standards are not reached by trial in adversary form does not mean that they are not entitled to great respect. This Court has long given considerable and in some cases decisive weight to Treasury decisions and to interpretive regulations of the Treasury and of other bodies that were not of adversary origin." *Skidmore vs. Swift & Company,* 323 US 134.

Petitioners also make issue of the fact that the corrective supplemental patent issued to Nordwick in 1956 was granted without prior notice to the Tribe. Respondents agree with the lower Courts that it would have been the better practice for the Department to have given notice to the tribes. (Pet. Br. p. 12) However, in not doing so, no statute or regulation was violated. The question presented was one of law rather than fact. The act of issuing the supplemental patent in the manner in which it was done, is significant only to the extent that it evidences a continuation of the consistent and uniform prior administrative practice with reference to lands covered by pre-1927 Act entries. The Indians have not been deprived of their day in Court. They have been in Court since 1963.

(3) AUTHORITIES CITED BY SOLICITOR

Petitioners seek to place the lower Courts in error on the basis of a 1966 letter written by the Solicitor which cites authorities demonstrating that on any homestead entry the United

States may withdraw the land or reserve the minerals at any time before all requirements leading to the issuance of a patent have been satisfied. (Pet. Br. p. 13)

Respondents have consistently conceded the validity of this statement and the authorities cited in support of it. Respondents agree that the United States could reserve the oil and gas. The question, however, is not whether they could have but did, by use of the language "undisposed of". Therefore, these authorities miss the point. The language used by Congress is ambiguous and uncertain and no direct evidence exists which pinpoints its exact intention. It is for this reason that the interpretation given at the time, by the agency which understood its purposes and was charged with its execution, was considered controlling by the lower Court.

Petitioners now seek, after the entire function of the 1927 Act has been performed, to impose rules which existed then, but were not considered applicable by those best positioned to know the objectives and purposes of the Act. Certainly, after the functions of the law have run its course and been fully performed, the many, many entrymen whose rights and interests have become fixed, should not be penalized because the theories of another generation of administrators acting after the fact and having no rapport with the purposes and objectives of the 1927 Act, feel that what was done should have been done differently.

Patent on the face of the letters written by the Solicitor's Office, commencing in 1956 and in the Government Memorandum of 1966, is a complete lack of knowledge of, or interest in, the past practices of the Government in patenting which may be as much as 200,000 acres of pre-1927 Act entries. Being totally unaware of these facts, it is understandable that they are citing completely inappropriate authorities.

(4) WIDESPREAD EFFECT

Petitioners acknowledge and respondents agree that although this case involves the oil and gas under 160 acres, the final decision will affect oil and gas underlying perhaps 200,000

acres of former Indian land. Petitioners view is that the lower Court decision deprives the tribe, but the true fact is that we are not concerned with 200,000 acres of land which is to be patented in the future, but that same amount of land which was patented long ago, some of it as many as 40 years ago. Thus, it is the homesteaders, not the tribe, who for all of this time have presumably been vested with the oil and gas and they will suffer the deprivation if the decision of the lower Court is reversed. Such loss and all the problems created by it will also extend to the heirs, assigns, lessees and mortgagees of these entrymen.

CONCLUSION

It is submitted that the decision of the lower Court is correct and the petition of the Tribes should be denied.

Respectfully submitted,

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